# Rule of (German) Law?

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As I see it, the central question is whether Germany, just as it is an economic and a political power in the EU, is also a *legal* power. This would, of course, beg the question whether this notion makes sense by itself. Is it permitted to speak of legal power in the way it is preached for other forms of power? And supposing the notion applies to Germany as a Member State of the EU, may this national condition be aptly described as *hegemonic*? The ultimate question behind the questions just mentioned would be 'How can this problem be tackled?', assuming that it indeed turns out to be a problem.

It is not too risky to assume that the recent ruling of the Second Senate of the Federal Constitutional Court on the ECB's Public Sector Asset Purchase Programme (*Weiss*) has played a role in stirring up the debate behind these questions. The ruling can be seen as a manifestation of power in the EU by means of a legal instrument, a judicial decision. If that were the case, it would be easy to conclude that legal hegemony is conceptually possible in the European legal space.

But this is not the only dimension of the notion we are dealing with, as put forward by Armin von Bogdandy in his thought-provoking invitation to consider the matter. National legal hegemony may result from a variety of phenomena. Given the impossibility of addressing all of them, I will focus on the specific dimension that I have already alluded to, i.e., how a given EU Member State can take the position of a legal, possibly hegemonic, power within the European Union as a whole.

With this in mind, I argue that, in the case of the EU, the category of 'legal power' should not be a problem. As a supranational polity, perhaps the first, and in any case the best example of this political genre, the Union has–with gusto–named itself a 'communauté de droit'. The term has a number of implications, but it most prominently refers to the condition of law as the paramount instrument to construct and preserve the Union. In short, law matters in the Union. At the EU domestic level, questions of law are in the consequence questions of power. This calls for a brief explanation.

EU law, as an existential condition for the EU, is a 'new' kind of law in itself and as such different from the legal orders in each of the state units making up the Union. This was from the beginning the implication of the judicial characterization of EU law as an 'autonomous' legal order, alongside the other two components of the structural *trias* of the EU legal order, that is, primacy and direct effect. The question, and the challenge, was how to build this autonomous legal order out of the founding Treaties.

The challenge was how to give meaning and content to each of the formulae of the new legal order. This process had to take into account that the starting point, further to the Treaties, was a set of neatly different national legal orders. Whereas international law had a language common to all Member States, this was not

the case for the different fields to be increasingly covered by Union law. A single meaning for the words making up the new legal order, regardless of where in the EU they were to be enforced, was a precondition for the effectiveness of EU law. Thus was born the key notion of the 'autonomous concepts' of EU law in the case-law of the Court of Justice. These were to exist within the European legal space by themselves, that is, detached from their various domestic meanings.

This is where the different national legal orders, and the national legal cultures, see the opportunity to *compete* among themselves in order to *impose* their own legal institutes and constructions. As a result, the categories of EU law are frequently only autonomous on the surface, in the sense that national legal notions (some of them more than others) have left their mark in the setting up of the new legal order.

This is also how we can posit that Germany, as a founding State of the Union, in a similar way as a small number of other member states, is a 'legal power' within the Union. It is surely debatable whether Germany holds the first position in this competition, but there is no doubt that it has very strongly influenced the conception and development of the law of the Union. I will just make two basic remarks on a couple of core categories that can aptly illustrate this claim.

The very notion of 'communauté de droit' leads spontaneously to one of the values of the Union, the rule of law. Nevertheless, in the EU legal order *rule of law* is not understood as the counterpart par excellence to the sovereignty of parliament (see Lord Bingham), but as part of a whole set of values as enunciated in article 2 TEU, akin to the German notion of *Rechtsstaat*. In a word, we say *rule of law* where we largely understand *Rechtsstaat*. For its part, the notion of 'human dignity', which is now the object of the first article of the EU Charter of Fundamental Rights, is so embedded in the genetic code of contemporary German legal culture that the Court of Justice of Luxembourg has conspicuously given it a reinforced meaning in its projection on Germany as a Member State (*Omega*). These simple examples reveal how a few basic legal notions may result in a perceptible pre-eminence of one state's legal order over others' in the European legal space.

Is all this a problem in the case of Germany? In my view, not necessarily. The notion of legal power, far from conveying the idea of exclusion, admits all kinds of complementarity. In cultural terms, referring to Germany as a 'legal power' simply entails accepting that German legal scholarship strengthens the Union's condition as 'communauté de droit'. And, it goes without saying, that, in this respect, Germany goes hand in hand with the 'latecomer' Austria. In sum, "the German approach" is clearly present in EU law.

In my opinion, the problem arises when this legal power behaves, or at any rate is perceived, as *hegemonic*. Hegemony being understood in the sense of the exclusion of the others. Coming back to the *Weiss* decision, Germany, as a legal power in the EU, behaves as a hegemon when its Constitutional Court, not content with the 'Siegeszug' of the principle of proportionality test in the European legal space, fatally describes a decision of the ECJ as irrational because it has not satisfactorily completed all the rituals of the said test. When the 2nd Senate of the

Federal Constitutional Court engages in this kind of adjudication, the appropriate term is hegemony.

Nevertheless, it would not be fair to put all the blame on this court. There are a number of substantial problems in the structure of the EU legal order and they cannot be ignored in any complete assessment of the said ruling. To put an end to these few remarks, I will simply refer to a clear *deficit* in the autonomous conceptualization of basic constitutional categories in Union law. To mention a critical one, there is a clearly flawed autonomous conceptualization of the notion of national/constitutional identity. The fact is that this notion is far from being an autonomous concept of EU law, not so much in its national content, which is unavoidable, but in its inception as a common legal notion. Germany (*Weiss*, again), has recently shown the far-reaching consequences of an intrinsic, and not only procedural, content of the right to vote as part of its own understanding of representative democracy. This understanding of a basic constitutional notion is in itself worth a thorough discussion at EU level, absent hegemonic positions.

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